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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 517

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE KRONSHAGE, JR., individually and as a Commissioner of said Public Service Commission of Wisconsin, A. R. McDONALD, individually and as a Commissioner of said Public Service Commission of Wisconsin, DAVID E. LILIENTHAL, individually and as a Commissioner of said Public Service Commission of Wisconsin, WILLIAM M. DIENNEN, individually and as Secretary of said Public Service Commission of Wisconsin, and JOHN W. REYNOLDS, individually and as the Attorney General of Wisconsin,

Appellants,

vs.

WISCONSIN TELEPHONE COMPANY, a Wisconsin corporation,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE TO AFFIRM

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Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION BY APPELLEE TO AFFIRM

NATURE OF CASE AND RESULT BELOW

Appellee, Wisconsin Telephone Company, has filed its motion to affirm the decree below. This brief is in opposition to the motion.

The present proceeding is an appeal by the Public

Service Commission of Wisconsin et al., from a decree of the specially constituted District Court in the Western District of Wisconsin, granting an interlocutory injunction against a temporary rate reduction order of the Commission, which order would have been effective August 1, 1932, for a maximum period of one year, if it had not been enjoined.

THERE WAS NO OPINION BELOW—*no findings of fact or conclusions of law filed.*

ASSIGNMENT OF ERRORS

We assigned the following errors (R. 454-455):*

1. The court erred in not finding any facts or stating any legal conclusions which show confiscation.

2. The court erred by abusing its discretion and arbitrarily granting the interlocutory injunction.

3. The court erred in not reserving to the defendant Public Service Commission of Wisconsin any power to make the rate reduction, herein enjoined, by way of a permanent order after the completion of its investigation and after the temporary order, herein enjoined, shall have expired by its own terms on July 31, 1933.

4. The court erred in holding that the rates prescribed by the order of defendant Public Service Commission, dated June 30, 1932, would result in confiscation of complainant's property.

5. The court erred in granting the interlocutory injunction enjoining defendants from attempting to compel

*References are to the original transcript of the record. The record has not been printed.

complainant to observe or put in force the rates for telephone service prescribed by the order of the Public Service Commission, dated June 30, 1932, or to comply with said order, and also enjoining said defendants from taking any steps or proceedings to enforce said order.

STATEMENT OF JURISDICTION

Statement of Jurisdiction has been filed by appellants (Separate Record, 1-11)** and appellee does not dispute that the appeal comes within Section 266 of the Judicial Code. (Separate Record, 16).

RULE 7—ARE THE QUESTIONS "UNSUBSTANTIAL"?

Appellee's motion to affirm—under Rule 7, paragraph 4—can not be received unless "it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

No suggestion is made by appellee that the appeal was taken for delay.

The issue before the Supreme Court, therefore, is: Are the questions on which the decision of the cause depends "so unsubstantial as not to need further argument"?

We submit:

**Separate Record refers to the separate transcript containing Appellants' Statement as to Jurisdiction and Appellee's Statement in support of Motion to Affirm.

SUMMARY OF ARGUMENT

I.

The court enjoined the rate order of the Wisconsin Public Service Commission as confiscatory, without any findings of fact or conclusions of law, in flat defiance of Equity Rule 70½.

II.

The court abused its discretion and arbitrarily granted the injunction without the "adequate hearing and full deliberation" contemplated by Section 266 of the Judicial Code.

III.

The court in effect issued a permanent injunction without giving even the consideration which a temporary injunction deserves.

IV.

The court paralyzed the power of the Public Service Commission to issue a permanent rate order after the temporary order, enjoined, shall have expired by its own terms.

We believe that these are substantial questions and call for further argument. We briefly sketch them as follows:

ARGUMENT

I.

THE COURT ENJOINED THE RATE ORDER OF THE WISCONSIN PUBLIC SERVICE COMMISSION AS CONFISCATORY, WITHOUT ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW, IN FLAT DEFIANCE OF EQUITY RULE 70½.

The court granted the injunction from the bench without even a prima facie determination, then or afterwards, of the findings of fact or conclusions of law which establish confiscation.

The statutory court had no discretion not to make findings of fact and conclusions of law. Equity Rule 70½ is specific:

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

In *Indianapolis Water Company v. McCardle*, United States District Court, Southern District of Indiana, decided July 21, 1932, 1 F Supp. —, the statutory court, *in denying the interlocutory injunction,* said (Evans, Circuit Judge): "In all matters of this kind, in view of Rule 70½, we have to make findings of fact upon the determinative issues."

In *Graniteville Manufacturing Company v. Query*, 44 F (2d) 64, 65, the statutory court, *in denying the interlocu-*

tory injunction, made findings of fact pursuant to Rule 70½ *even though the parties had stipulated to the facts.*

The Supreme Court of the United States has not passed directly upon Rule 70½, to our knowledge, at the time of writing this brief. In *State Board of Tax Commissioners v. Jackson,* 283 U. S. 527, 535, the Supreme Court said, however, in *reversing* the decree for injunction below:

> "The district court failed to make findings of fact and law as now required by Equity Rule 70½, but contented itself with a partial summary of the facts and certain general conclusions of law. Had the rule been in force at the time of the trial, we should feel constrained to remand the case with directions to make such findings. . . . ."

Counsel for appellee in its Statement in support of motion to affirm, refers to the fact that a decree for interlocutory injunction was sustained by the Supreme Court, even though no opinion was rendered below, in *Mitchell v. Penny Stores,* 284 U. S. 576. It may be significant that the Supreme Court said in that case:

> "The order was made *prior* to the decision of this court in *State Tax Comrs. v. Jackson,* 283 U. S. 527 . . . ." (*supra*)

Page 40 of the record in Mitchell v. Penny Stores shows that the interlocutory injunction was filed Sept. 9, 1930—before the effective date of Rule 70½, which was October 1, 1930.

The Circuit Court of Appeals for the Third Circuit in *Board of Public Utility Commissioners v. Elizabethtown Water Company,* 43 F (2d) 478, 481, said:

> "We have before us the new Equity Rule No. 70½ (28 USCA No. 723), not yet effective, requiring

the 'three judges' of a 'court of first instance' 'to find facts specially and state separately its conclusions of law thereon' in cases of this kind, and we have in mind the insistence of the Supreme Court, last made in *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82, 50 S. Ct. 228, 74 L. Ed. 717, that in cases of this character district courts shall state the grounds for their decisions. . . ."

It is noteworthy that Rule 70½ was promulgated less than three months after the decision of the Supreme Court in the *Maxcy* case, wherein the Supreme Court directed the very District Court involved in the present case, namely, the United States District Court for the Western District of Wisconsin, to present findings of fact showing the basis for its action in enjoining a state order.

The Supreme Court of the United States said in *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82, 83, 84: (Injunction)

"This court has repeatedly adverted to the importance in a suit of this character of a statement by the district court of the grounds of its decision. . . . .

". . . . *'The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.'* . . . .

"The decree is set aside, and the cause is remanded to the district court, specially constituted as provided by the statute, to state its findings of fact and conclusions of law and enter a decree thereon, ..."

The Maxcy case was decided March 12, 1930. Rule 70½ was promulgated June 2, 1930, effective October 1, 1930.

The Circuit Court of Appeals for the Fourth Circuit said in *Meadows v. Cheshire,* 58 F (2d) 628:

> ". . . . The district judge did not find the facts with regard to the claim of Meadows nor state his conclusions of law with regard thereto, *as required by equity rule 70½; and it is impossible for this court to review the order with any understanding of the grounds upon which the court acted.* The case will be remanded, therefore, in order that the judge may, in compliance with the rule, find the facts and set forth his conclusions of law."

Extended discussion of the decisions of lower federal courts which have expressly followed Rule 70½, seems superfluous. We merely cite them.

> *Posselius v. City of Detroit,* 44 F (2d) 395, 399;
> *Western Electric Company v. Kersten Radio Equipment,* 44 F. (2d) 644, 647;
> *Briggs v. United States,* 45 Fed. (2d) 479, 480.

> "(1) This is an equity proceeding. The recent Supreme Court rule (Equity Rule 70½, June 2, 1930 [28 USCA No. 723]) requires that the trial judge make findings of fact and law. Lacking any exposition of that rule by the Supreme Court, we do not understand that it contemplates, in the ordinary equity case, all the proceedings and formalities which attend such findings in suits at law. Until it is otherwise authoritatively held, we shall think the rule satisfied by a clear and concise statement by the trial judge—whether called findings or opinion—which shows what he regards as the *essential facts* and the applicable rules of law. . . ."

> *Gates Rubber Company v. Goodrich Rubber Company,* 45 F. (2d) 652, 657;
> *Metropolitan Device Corp. v. American Casting Corporation,* 46 F. (2d) 509, 511;

Ullman v. Sobel, 47 F. (2d) 612, 615;
Lewys v. O'Neill, 49 F. (2d) 603, 618;
Interstate Commerce Commission v. Piedmont Railway Co., 51 F. (2d) 766, 777;
Hazeltine Corp. v. Radio Corporation of America, 52 F. (2d) 504, 512;
Hutchings v. Caledonian Insurance Company, 52 F. (2d) 744, 745;
American Can Company v. M. J. B. Company, 52 F. (2d) 904;
Parker v. St. Sure, 53 F. (2d) 706, 709.

". . . . The court has inherent power to remand an equity case for further findings, if such findings are necessary to a proper exercise of its appellate jurisdiction. *Panama, etc., v. Vargas, supra.* With this inherent power recognized and enforced by Equity Rule No. 70½, the appellate court can secure the necessary co-operation of trial judges in the performance of its duties."

Harris v. Morse, 54 F. (2d) 109, 116;
Kaufman v. Tames, 56 F. (2d) 193, 196;
General Electric Company v. United States Electric Company, 56 F. (2d) 630, 634;
Traitel Marble Co. v. Manhattan Company, 56 F. (2d) 1039, 1046;
Allied Stamping Company v. Standard Electric Corporation, 57 F. (2d) 296, 305;
Queen Insurance Company v. Citro, 58 F. (2d) 107, 110;
Automatic Company v. A. O. Smith Corp., 60 F. (2d) 740, 742;
Frankfurter and Landis, 45 Harvard Law Review, 271, 299-300, (December, 1931).

Two of the leading and most recent text writers on Federal Practice emphasize that Rule 70½ *changes the pre-existing law and practice.*

Nichols, Cyclopedia of Federal Procedure, Volume 8, Section 5547a, (July, 1930)

"No. 5547a—NEW 1930 RULE. A new Equity Rule numbered 70½, to become effective October 1, 1930, provides that 'in deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record' and included in the record if an appeal is taken from the decree. *THIS CHANGES THE PRE-EXISTING LAW AND PRACTICE.*" (Our caps)

Nichols, Cyc., Sec. 5552.

"5552. MATTERS WHICH SHOULD, OR MAY, BE OMITTED IN DECREE. These include the following:

* * * * * * * * *

"2. Findings of fact and conclusions of law, except where necessary to make the decree clear and specific, *and except where required by Equity Rule 70½* . . . ."

Hughes, Federal Practice, Sec. 10962:

"10962. FINDINGS AND CONCLUSIONS

"A court of three judges is required to find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions must be entered of record, and, if an appeal is taken from the decree, must be included by the clerk in the record which is certified to the appellate court under Equity Rules 75 and 76."

Hughes, Fed. Prac., Sec. 11438.

"11438. CONTENTS

"The decree should point out precisely:

"* * * * * * * *

"(f) *Find facts specially, and state separately conclusions of law thereon.*"

Footnote No. 3, Hughes, 11438.

"*Prior to Rule 70½.*

"*Prior to the promulgation of equity rule 70½,* it was proper to include findings of fact only when necessary to make the decree more clear and specific. *U. S. v. Goldstein* (C.C.A. Mo. 1921) 271 F. 828 . . . ."

The Supreme Court of the United States has frequently stressed the desirability of findings of fact, even in the absence of Rule 70½.

We have mentioned the *Maxcy* case, in which the decree was set aside because of lack of findings of fact and conclusions of law.—*Railroad Commission of Wisconsin v. Maxcy,* 281 U. S. 82, 83, 84.

Other recent decisions of the United States Supreme Court have been to the same effect.

Virginian Railroad Company v. United States, 272 U. S. 658, 675:

"Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts."

C. C. C. & St. L. Railway Company v. United States, 275 U. S. 404, 414:

". . . . Where the trial court omits to state the grounds of its decision, the appellate court is denied an important aid in the consideration of the case . . . ."

B. & O. Railroad Company v. United States, 279 U. S. 781, 787;
Arkansas Railroad Commission v. United States, 274 U. S. 596, 603;
Panama v. Vargas, 281 U. S. 670, 671, 672:

". . . . The decree does not show on what premise of fact or law it was given, but only that it was given on some premise which in the court's opinion entitled the plaintiff to the decree. . . . .

"If the judge who presided at the trial and rendered the decree is prepared to make such findings without a further trial, that course may be taken; otherwise the case should be retried."

II.

THE COURT ABUSED ITS DISCRETION AND ARBITRARILY GRANTED THE INJUNCTION WITHOUT THE "ADEQUATE HEARING AND FULL DELIBERATION" CONTEMPLATED BY SECTION 266 OF THE JUDICIAL CODE.

No court reporter was present at the "hearing" on the application for interlocutory injunction. There is no transcript of the hearing.

We quote the following from our Statement of Jurisdiction filed pursuant to amended Rule 12—effective September 1, 1932—(Separate Record, 8-10):

"B.

* * * * * * * * *

"II.

"It was an abuse of discretion to grant the interlocutory injunction arbitrarily without the 'hearing and determination' required by section 266 of the Judicial Code.

"The opinion and order of the Public Service Commission of Wisconsin, herein enjoined, cover a ten page

synopsis, 156 pages of printed text and a glossary of terms. The Commission had worked on the case preparatory to the order for eleven months.

"The record before the Commission consisted of over 2,000 typewritten pages of testimony and 83 exhibits at the time its order was issued and over 2,400 typewritten pages of testimony and 94 exhibits at the time the statutory court convened. The so-called Madison record, which was incorporated into the record upon which the Commission's order was based, included in addition 1,400 typewritten pages of testimony and 153 exhibits.

"The bill of complaint of the complainant in court consisted of 21 printed pages, 8x11, plus divers exhibits, including its petition for rehearing before the Commission, which included 32 such printed pages and embraced 47 paragraphs and miscellaneous sub-paragraphs.

"The answer of the defendants covered 25 printed pages, 8x11, plus a copy of the Commission's order denying rehearing before the Commission. *Every material allegation of the bill of complaint was specifically answered.*

"Complainant's main affidavits on the application for interlocutory injunction, including its affidavits on the temporary restraining order, embraced 125 printed pages, 8x11.

"Defendants' main affidavits on the application for interlocutory injunction embraced 88 printed pages, 8x11.

"Complainant's reply affidavits on the application for interlocutory injunction embraced 68 printed pages, 8x11.

"Defendants' reply affidavits on the application for interlocutory injunction embraced 29 printed pages, 8x11.

"The complainant also introduced exhibits as part of its affidavits on application for interlocutory injunction, which exhibits are contained in a volume, 10x16 inches, including statistical tables, price trend

charts, indices, balance sheets, income statements, contracts between Wisconsin Telephone Company and American Telephone and Telegraph Company and Western Electric Company, Inc., and data of many descriptions, covering roughly 150 pages.

"The consideration which the court gave to the 156 page opinion and order of the Commission, to the pleadings, to the some 450 pages of affidavits and exhibits attached thereto, was the following:

"These papers were laid before the three members of the court for the first time at 10:30 a.m. on September 21, 1932, (except insofar as the District Judge, Honorable F. A. Geiger, had access, on the application for a temporary restraining order, to the bill of complaint and complainant's affidavits in support of the application for temporary restraining order only.)

"The court took up the case at 10:30 a.m. on September 21, 1932, and was through with the case shortly after 3:00 p.m. on the same day, having taken three recesses in the meantime, one of them for an hour and a half at lunch.

"The presiding judge twice announced from the bench that the members of the court would have to leave by four o'clock.

"The court did not take the matter under advisement. The interlocutory injunction was granted from the bench."

None of the above quoted statements of fact is contradicted in appellee's Statement in support of motion to affirm, although it suggests three qualifications of our statements (Separate Record, 16-17):

First: Appellee suggests that one of the three recesses which the court took was the one in which the court reached its determination. This is probably true. And we respectfully submit that three judges who, in a ten minute recess, can determine facts of confiscation on a record as momen-

tous as this one and who, scarcely flicking the pages of the 156 page Opinion and Order, will peremptorily enjoin such order from the bench—are guilty of whimsical and capricious conduct, which deserves to be reversed.

Second: Appellee suggests that the Commission's record was not before the court. This is true. We indicate the "voluminousness" of the Commission's record only as emphasizing that the court, with utter arbitrariness, brushed aside eleven months' work of a State Commission and by *fiat* declared that confiscation existed.

Third: Appellee suggests that we answered some of the allegations in the bill of complaint on information and belief or denial of knowledge. This is true as to certain parts of our answer, for reasons which we believe will be found adequate. We have mentioned our answer because it placed every principal point of complainant's case specifically in issue. *The lower court, however, when it granted the injunction, apparently did not know that the case was at issue at all! After* the injunction had been granted from the bench, inquiry was made from the bench as to whether answer had been filed.

We can not accede to one conclusion made by appellee in its Statement in support of motion to affirm (Separate Record, 17), when appellee says:

> "Besides having printed copies of the pleadings and affidavits before each member of the court, the matters covered were placed before the court, so far as was required, in the arguments of counsel."

We believe that we may say without contradiction—(there were witnesses in court who can make affidavits)—

that the members of the court—as far as giving any visible sign—did not so much as thumb the pages of the pleadings or affidavits.

Regarding the matters being placed before the Court, *"so far as was required"*, by argument, we may say that we had prepared a *fifty page* typewritten trial argument, and were told by the presiding judge to discuss *one* point, which covered just *four lines* in our trial argument.

We may inject that our argument was a little over thirty minutes in length and much of it was consumed by an enforced colloquy with the presiding judge who, *inter alia,* admonished counsel that these State Commissions could not expect to just walk in, "hang up their hats", and order rate reductions. (The Wisconsin Commission had worked on the case for eleven months. The Commission record was contained in two boxes, approximately 18x15x15 inches, which were in court.) His Honor added that the "widows" and others who own public utility stock, must be protected. (The sole owner of the common stock of Wisconsin Telephone Company is American Telephone and Telegraph Company, the largest corporation in the world.)

The particular point which the court instructed us to argue, reminding us that the court had to leave at four o'clock (it being then after 2:00 p.m.), was a legal point which, in our judgment, reflects a wholly erroneous doctrine of law. We are, however, powerless in the Supreme Court to show that the lower court was influenced by an untenable legal theory, for we can not tell from any opinion or conclusions of law filed—there being none—whether the court granted the injunction upon the ground which we regard as unsound, or upon some other ground, or upon no ground at all.

"A proper discretion does not include the misapplication of law to conceded facts."—32 Corpus Juris 32.

We have no means, however, of proving to the Supreme Court that the law was misapplied. On this case involving $1,500,000 to the telephone subscribers of Wisconsin, the statutory court has left no record, except the minute in the Clerk's journal! (R. 442)

The Clerk has sent to counsel for both sides a copy of remarks (not filed as an opinion) which the court delivered in granting the injunction. These remarks are in two paragraphs as follows:

"HONORABLE GEORGE T. PAGE:

"The opinion of the Court is that under the circumstances here shown the injunction should be granted, and is granted.

"On the question of the bond, under what appears here it seems to the Court that a bond given by the company, without security, in the sum of $1,000,000 would be a fair and reasonable bond to give at this time, with the permission to the Commission that if there appears at any time to be a change in the Company's affairs from what it is now understood that they are, that it may apply to the Court for security upon that bond."

It is perfectly understandable to us why the court did not make any findings in compliance with Rule 70½ or the *Maxcy* case. *The court could not make findings.* Its members had no knowledge of what the facts on confiscation showed, not even enough to satisfy the requirement on in-

terlocutory injunction for a *prima facie* determination of these facts.

Yet the court granted the injunction from the bench. And *post hoc*—twenty-seven days later—a decree was filed, asserting confiscation in one typewritten line. (R. 443)

We respectfully submit that the mandate of the Judicial Code, Section 266, for a "hearing and determination", has been flagrantly disregarded.

The purpose of Section 266 was to get rid of the abuse exemplified in this very case and to assure a respectful hearing by the federal judiciary upon important state orders.

This Court has more than once pointed out that Section 266 was intended to guarantee "adequate hearing and full deliberation" to which the statutes of a state government and orders of its administrative authorities, are entitled.

> *Stratton v. St. Louis Southwestern Railway Company*, 282 U. S. 10, 14;
> *Cumberland Telephone and Telegraph Company v. Louisiana Public Service Commission*, 260 U. S. 212, 216.

Appellee remarks (Separate Record, 16) that the recital of proceedings in our Statement of Jurisdiction "is outside of the record and therefore not before the court." We stand ready to supply formal proof by affidavits, in corroboration of our description of the proceedings, if challenge is made.

III.

THE COURT IN EFFECT ISSUED A PERMANENT INJUNCTION WITHOUT GIVING EVEN THE CONSIDERATION WHICH A TEMPORARY INJUNCTION DESERVES.

The Wisconsin Commission's order was a temporary order, which will expire by its own terms not later than July 31, 1933.

There is no prospect of obtaining an adjudication on the merits of a permanent injunction before that date. Counsel for appellee stated in court, in response to a question from the court at the time of granting the interlocutory injunction, that it would be six months before the company could go to trial.

Our prognosis is that there will be no trial until after six months and no determination on the permanent injunction until the Commission's order has *expired*. Appellee, in its Statement in support of motion to affirm, concedes this as a "possibility." (Separate Record, 18)

That being the case, the statutory court's interlocutory injunction is in fact a final injunction. The court accordingly owed it to defendants to grant a more thorough hearing and afford a higher degree of consideration than might be justified for an ordinary interlocutory injunction pending trial on the merits.

This the court did not do, as we have tried to show in II, *supra*. On the contrary, the court evidenced an attitude becoming the issuance of a restraining order.

Appellee's Statement points out that a bond was required. Quite true. The presiding judge asked us why the matter could not be disposed of by giving bond. Our

reply was that, if this was all that an application for interlocutory injunction required, we could see no point in Section 266 providing for three judges. His Honor laughed at our suggestion and said that, as far as he was concerned, one judge could have decided it.

Our further answer is that the telephone subscribers of Wisconsin want lower rates NOW, if they are entitled to them, and not a bond to get them a year or five years from now. (There has been a bond in the Chicago telephone case since 1923 and we venture to say that many of the subscribers of the past nine years can not be located any more.)

The depression is on now and every penny of savings counts *at this time.* The Wisconsin Telephone Company lost 15,000 stations—by which, loosely, is meant subscribers—in the first six months of 1932. (R. 312) People have discontinued telephone service.

Circuit Judge Shelby very fittingly said in *L. & N. Railroad v. Railroad Commission,* 208 Fed. 35, 60: "The people who would travel at a lower rate or who do not travel when the rate is unreasonable, are interested in enforcing the rate fixed by the Commission. No bond can be framed to protect them. . . . ."

If interlocutory injunctions are to be issued merely on a balance of convenience, then Section 266 of the Judicial Code becomes a farce.

IV.

THE COURT PARALYZED THE POWER OF THE PUBLIC SERVICE COMMISSION TO ISSUE A PERMANENT RATE ORDER AFTER THE TEMPORARY ORDER, ENJOINED, SHALL HAVE EXPIRED BY ITS OWN TERMS.

The statutory court not only enjoined the Commission's order which expires July 31, 1933. The court also enjoined the rates, i.e., the 12½% rate reduction, *as such.* (R. 444)

The Wisconsin Commission's order, enjoined, is an interim order. Investigation of the Wisconsin Telephone Company by the Commission began in August, 1931. At the expiration of eleven months of study by the Commission's staff, a temporary rate reduction was ordered, effective for a year.

The investigation is in constant progress. (R. 232) At the end of a further twelve or thirteen months—that is, when the temporary order has expired—the Commission may be possessed of a record which indisputably calls for a 12½% rate reduction by a permanent order.

The Commission could not issue such order without being in contempt of court, assuming the interlocutory injunction still in effect, which we do assume, (III, *supra*).

Reservation to the Commission of power to issue a permanent order under such circumstances, should have been made in the decree. There is no such reservation. (R. 433-446)

We hope that appellee is right in saying in its Statement in support of motion to affirm that "at the end of

the year designated in the Commission's order, *the force of the injunction is spent.*" (Separate Record, 20) We question, however, the soundness of appellee's construction. We do not want to risk our rights to interpretation.

As to appellee's argument that we can always ask modification of the interlocutory injunction, if it appears proper for the Commission to issue a permanent order, we have this to say:

The right of the Public Service Commission of Wisconsin to issue a permanent order after its temporary order has expired, should not be made dependent upon consent by the three members of the present statutory court to a modification of their own injunction.

This right of the regulatory authorities of the State of Wisconsin to initiate a new order when the enjoined order has expired, should exist *as a right* and not at the discretion of the specially constituted District Court in the Western District of Wisconsin.

CONCLUSION

There is only one question on the merits: *Confiscation.*

On this motion to affirm, we shall not go into analysis of evidence or legal points which bear upon Confiscation. The statutory court has laid down no findings of fact or conclusions of law which we can either admit or dispute.

The Commission indicated a net return to the company of $3,812,227 from the "exchange" rates herein involved, before the rate reduction, and $2,245,777 after the reduction ordered, on an annual basis figured for 1931. (R. 73, 74. See Opinion and Order of the Commission, pp. 89, 96)

This return was stated by the Commission to be $13.35 per share of common stock before the rate reduction and $7.41 thereafter and 10.88% on common stock equity (par value of stock plus surplus) before the rate reduction and 6.04% thereafter. (R. 273, 274)

What percentage return on fair value of property is to be considered reasonable, in present conditions, what dollars of return appeared to be available to the company, what presumptive showing of fair value had been made out by the telephone company to the court's satisfaction—these and other matters—if the court grounded confiscation upon them—would appear to be appropriate elements in the District Court's determination. None are contained in it.

Our own deduction from the course of the oral argument is that it was not a question with the lower court of what the figures showed. The court seemingly seized upon a legal conception—a faulty one, in our opinion—in justifying the granting of the injunction from the bench. We are precluded from arguing the legal point, however, because the court does not spell out either law or facts to substantiate its judgment.

We do earnestly urge that the issue of Abuse of Discretion, under all the circumstances, is not such an "unsubstantial" question as to foreclose argument and warrant summary affirmance pursuant to Rule 7, Paragraph 4.

In resisting the motion to affirm, we rely upon (1) Violation of Equity Rule 70½—I, *supra;* (2) Arbitrary conduct of the lower court—II and III, *supra;* and (3) Deficiency, amounting to injustice, in the decree itself—IV, *supra.*

These are sufficient reasons for not affirming. Indeed, it would seem that they constitute grounds for reversing.

Respectfully submitted,

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